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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRELL YOUNGER, Defendant and Appellant.	A110031 (Sonoma County Super. Ct. No. SCR24618)

Defendant and appellant Darrell Younger contends that his conviction for the second degree murder of Heather Moore should be reversed because his rights under the confrontation clause of the Sixth Amendment were violated by the admission at trial of Heather's hearsay statements. As explained more fully below, we conclude that certain statements attributed to Heather constituted testimonial hearsay and their admission at trial violated appellant's Sixth Amendment right to confrontation. Furthermore, because we cannot say that the erroneous admission of these statements was harmless beyond a reasonable doubt, as required under *Chapman v. California* (1967) 386 U.S. 18, we reverse appellant's conviction and remand for further proceedings.

BACKGROUND

This is the third opinion we have issued in this case. In *People v. Younger* (2000) 84 Cal.App.4th 1360 (*Younger I*), we reversed appellant's conviction for first-degree murder due to error in instructing the jury regarding appellant's prior offenses of

domestic violence against Heather and others.[1] (*Ibid.*) After a retrial by jury beginning in November 2003, appellant was convicted of second-degree murder, in violation of Penal Code section 187, subdivision (a).[2] On March 28, 2005, the trial court sentenced appellant to an indeterminate term of 15-years to life, to be served concurrently with a 2-year term for an auto theft conviction we let stand in *Younger I*.

We affirmed appellant's conviction in *People v. Younger* (June 28, 2007, A110031) 2007 WL 1848976 [nonpub. opn.] (*Younger II*).[3] In *Younger II*, appellant contended, among other things, that Heather's statements regarding other instances of domestic violence constituted testimonial hearsay admitted in violation of his Sixth Amendment right to confrontation under the high court's opinion in *Crawford*.[4] We rejected appellant's *Crawford* claim. Applying the doctrine of forfeiture by wrongdoing as set forth by the California Supreme Court in *People v. Giles* (2007) 40 Cal.4th 833, we concluded that appellant forfeited his confrontation claim because a preponderance of the evidence supported the finding that Heather's unavailability at trial was caused by appellant's intentional criminal act. (*Younger II, supra,* at p. *9.)

After our opinion in *Younger II*, the United States Supreme Court granted certiorari and vacated the judgment in *People v. Giles, supra,* 40 Cal.4th 833. (See *Giles v. California* (2008) 128 S.Ct. 2678, 2684 [holding that "unconfronted testimony" may

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1 Between 1990 and 1995, appellant and Heather Moore had a turbulent relationship marked by periods of separation and numerous physical and verbal altercations. Their relationship produced two children. Heather was found on January 4, 1996, strangled by a noose tied to the showerhead in the bathtub of her Santa Rosa apartment. (*Younger I, supra,* 84 Cal.App.4th at pp. 1361-1364.)

2 Further statutory references are to the Penal Code unless otherwise noted.

3 We incorporate by reference our prior opinions in *Younger I* and *Younger II*. Accordingly, we refer to particular testimony and evidence as required to resolve any issues before us without reciting the entire factual background for the case, with which the parties are familiar.

4 *Crawford v. Washington* (2004) 541 U.S. 36, 59 [holding that under the confrontation clause of the Sixth Amendment, testimonial statements of witnesses absent from trial are only admissible where the declarant is unavailable, and defendant has had a prior opportunity to cross-examine declarant].

not be admitted absent "a showing that the defendant intended to prevent a witness from testifying"].) Thereafter, the high court granted certiorari in this case, vacated the judgment, and remanded the matter to this court for further consideration in light of *Giles v. California, supra,* 128 S.Ct. 2678. (See *Younger v. California* (June 27, 2008) 128 S.Ct. 2994 [mem.].)

Thereafter, we invited the parties to serve and file simultaneous supplemental briefs addressing the effect of *Giles v. California, supra,* 128 S.Ct. 2678 if any, on the issues presented in this appeal. After reviewing the record again in light of the issues raised in the supplemental briefing provided by the parties, we ordered the Attorney General to file a further supplemental brief discussing whether any of the statements specifically identified by appellant in his initial supplemental brief constituted testimonial hearsay under the standards enunciated in *Crawford* and its progeny, and, if so, whether the admission of any testimonial hearsay was harmless beyond a reasonable doubt. The Attorney General timely submitted his further supplemental brief and appellant filed a reply brief thereto. We now address the issues briefed by the parties.

DISCUSSION

A. Forfeiture by Wrongdoing

As an initial matter, as required under the terms of the high court's remand, we must reconsider our forfeiture-by-wrongdoing analysis in *Younger II* in light of *Giles v. California, supra*. As noted, the high court held in *Giles v. California* that "unconfronted testimony" may not be admitted absent "a showing that the defendant intended to prevent a witness from testifying." (128 S.Ct. at p. 2684.) Regarding the showing required for the admission of unconfronted testimony in cases where domestic violence culminates in murder, the high court stated: "Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution ─ rendering her prior statements

admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify." (*Giles v. California*, *supra,* 128 S.Ct. at p. 2693.)

Here, the prosecution presented no evidence at trial that appellant murdered Heather with the intention of preventing her from testifying at ongoing criminal proceedings. Accordingly, the present record cannot support a finding that appellant killed Heather Moore with intent to prevent her from testifying or cooperating in a criminal matter. Thus, we conclude that appellant's Sixth Amendment claims are not barred by the doctrine of forfeiture by wrongdoing.[5]

Having concluded appellant's Sixth Amendment claims are not barred by the doctrine of forfeiture by wrongdoing, we now turn to whether: (1) Heather's statements constituted testimonial hearsay admitted in violation of appellant's Sixth Amendment confrontation rights; and, (2) whether the admission of any such testimonial hearsay was harmless beyond a reasonable doubt.

B. Testimonial Hearsay

1. Applicable Legal Standards

In *Crawford*, the high court held that the Sixth Amendment bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Crawford, supra,* 541 U.S. at pp. 53-54.) Nevertheless, the high court in that case did not attempt "to spell out a comprehensive definition of 'testimonial' " and even acknowledged that its refusal to do so would cause some "interim uncertainty." (*Crawford, supra,* 541 U.S. at p. 68 & fn. 10.) Subsequently, in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the high court "determine[d] more precisely which police interrogations produce testimony." (*Id.* at p. 822.) In that regard, the high court held: "Statements are nontestimonial when

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[5] Our conclusion does not foreclose reconsideration of the forfeiture issue in the event of a retrial. (See *Giles v. California, supra,* 128 S.Ct. at p. 2693 [noting that the trial court "is free to consider evidence of the defendant's intent on remand"].)

made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*)

The court's application of this holding to the facts of the consolidated cases[6] before it is illustrative. Examining whether the recording of the 911 call at issue in the *Davis* case produced testimonial statements, the court observed that a 911 call is " 'ordinarily not designed primarily to "establish[h] or prov[e]" some past fact, but to describe current circumstances requiring police assistance.' " (*Davis, supra,* 547 U.S. at p. 827.) In this regard, the court contrasted the 911 call at issue in *Davis* with the statement at issue in *Crawford, supra,* 541 U.S. 36.

The 911 caller in *Davis* "was speaking about events *as they were actually happening*" rather than describing past events, whereas "Sylvia Crawford's interrogation . . . took place hours after the events she described had occurred." (*Davis, supra,* 547 U.S. at p. 827.) Also, the court noted that "any reasonable listener would recognize" that the 911 caller, unlike Sylvia Crawford, "was facing an ongoing emergency" because it was "plainly a call for help against a bona fide physical threat" and did not attempt "to provide a narrative report of a crime absent any imminent danger." (*Ibid.*) Additionally, "the nature of what was asked and answered" in the 911 call, "viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." (*Ibid.*) Finally, the court noted that "the difference in the level of formality between the two interviews is striking" because "Crawford was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of her answers" whereas the 911 caller's "frantic answers were provided over the phone, in

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[6] *Davis v. Washington* (*Davis*) and *Hammon v. Indiana* (*Hammon*) (2006) 547 U.S. 813.

an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." (*Ibid.*)

The court concluded from all this that the circumstances of the 911 caller's interrogation "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." (*Davis, supra,* 547 U.S. at p. 828.) The 911 caller "simply was not acting as a *witness*" and her statements therefore were not testimonial in nature. (*Ibid.*)

On the other hand, where officers responded to a report of a domestic disturbance at the Hammon residence and interviewed Amy and Hershel Hammon in separate rooms, Amy's statements as recounted by the officer at trial were testimonial hearsay. (*Davis, supra,* 547 U.S. at pp. 819-820, 830.) The high court stated that "[t]here was no emergency in progress; the interrogating officer testified that he had heard no arguments or crashing and saw no one throw or break anything . . . there was no immediate threat to [the victim's] person. . . . the officer . . . was not seeking to determine . . . 'what is happening,' but rather 'what happened.' " (*Davis, supra,* 547 U.S. at pp. 829-830.) Accordingly, the high court concluded that the character of the statements that were the product of the interrogation in the *Hammon* case were obviously testimonial because "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." (*Ibid.*)

Recently, the California Supreme Court articulated the basic principles California courts are to consider in analyzing a confrontation issue in the wake of *Davis, supra,* 547 U.S. 813. In *People v. Cage* (2007) 40 Cal.4th 965, 970 (*Cage*), the court addressed whether hearsay statements by a victim to a sheriff's deputy and to a treating physician were testimonial for purposes of the confrontation clause. In *Cage,* Riverside County Deputy Sheriff Mullin responded to a report of a family fight. As he approached the house, Mullin saw drops of blood and a bloody towel. Inside the house, he found defendant picking up broken glass and noticed that the glass top of a nearby coffee table was missing. Mullin spoke to defendant and left the house with no reason to think a crime had been committed. (*Cage, supra,* 40 Cal.4th at p. 971.)

About an hour later, Mullin responded to a report of an injured person. A mile or two away from defendant's house Mullin found defendant's son John sitting on the curb with a large cut on the left side of his face. John was taken to the hospital by ambulance. Mullin went to the hospital later. John was still in the emergency room awaiting treatment. Mullin asked John what happened between him and defendant. John said he and his mother argued; she pushed him; he fell over the coffee table and the glass top broke; before he could get up, his grandmother held him while his mother picked up a piece of glass and cut him. (*Cage, supra,* 40 Cal.4th at pp. 971-972.)

After emergency room physicians evaluated John, he was seen by Dr. Russell, a head and neck surgeon. As was his usual practice, Dr. Russell asked John "what happened?" in order to obtain information about what caused John's injury. In particular, because of the nature of John's injury—a deep facial gash—Dr. Russell wanted to determine whether the cut might contain ground-in debris that must be cleaned out to prevent infection. John told Dr. Russell he had been "held down by his grandmother and cut by his mother." (*Cage, supra,* 40 Cal.4th at p. 972.) Dr. Russell asked John no more questions and treated the wound. (*Ibid.*)

To evaluate the testimonial character of the statements at issue, the California Supreme Court first examined the high court's "more recent effort to clarify what it means by testimonial hearsay" in *Davis, supra,*547 U.S. 813. (*Cage, supra,* 40 Cal.4th at p. 979.) The court "derive[d] several basic principles from *Davis*. First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony ─ to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the

conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage, supra,* 40 Cal.4th at p. 984, fns. omitted.)

Applying these principles to John's statement to Officer Mullin, the court noted that "by the time Mullin spoke with John in the hospital, the incident that caused John's injury had been over for more than an hour. The alleged assailant and the alleged victim were geographically separated, John had left the scene of the injury, and he . . . was in no danger of further violence as to which contemporaneous police intervention might be required." (*Cage, supra,* 40 Cal.4th at p. 985.) Moreover, there was no evidence Mullin's questions sought to facilitate John's emergency medical treatment. Rather, the court noted that Mullin's "role throughout had been as an investigating police officer. He arrived at the hospital only after John was already in medical hands. Mullin's clear purpose in coming to speak with John at this juncture was not to deal with a *present emergency*, but to obtain a fresh account of *past events involving defendant* as part of an inquiry into possible criminal activity. Indeed, the form of Mullin's question assumed that defendant might be the perpetrator of John's injury." (*Ibid.*) For these reasons, the court concluded it was "manifest that John's response to Deputy Mullin's question in the hospital waiting room was testimonial." (*Cage, supra,* 40 Cal.4th at p. 984.)

On the other hand, with respect to John's hospital statement to Dr. Russell, the court noted that Dr. Russell's "sole object in asking John 'what happened' was to determine, in accordance with his standard medical procedure, the exact nature of the wound, and thus the correct mode of treatment. The question was neutral in form, and though John responded by identifying defendant as his assailant, Dr. Russell did not pursue that avenue further." (*Cage, supra,* 40 Cal.4th at p. 986.) The court concluded that "[o]bjectively viewed, the primary purpose of the question, and the answer, was not

to establish or prove past facts for possible criminal use, but to help Dr. Russell deal with the immediate medical situation he faced." (*Cage, supra,* 40 Cal.4th at p. 986.) Moreover, the court continued, "the context of the conversation had none of the formality or solemnity that characterizes testimony by witnesses. In speaking with Dr. Russell, John did not confront structured questioning by law enforcement authorities. There is no evidence that Dr. Russell was acting in conjunction with law enforcement, or that his question about the cause of John's injury had any evidence-gathering aim. . . . Dr. Russell made no effort to record or memorialize John's statements for later legal use." (*Id.* at p. 987.) Rather, John's statement was made in the course of "a private conversation between a patient and his doctor, by which both presumably sought only to ensure John's proper treatment." (*Ibid.*) For these reasons, the court concluded John's statement to Dr. Russell was not testimonial. (*Id.* at p. 991.)

Appellant has identified several statements by Heather Moore in connection with prior instances of domestic violence that he asserts constitute testimonial hearsay erroneously admitted against him at trial in violation of his confrontation rights. With the legal principles explained in *Davis, supra,* 547 U.S. 813 and *Cage, supra,* 40 Cal.4th 965 in mind, we turn to address the merits of appellant's confrontation clause contention.

2. Heather Moore's Hearsay Statements

(a) Statement to Officer Gomez on April 26, 1993

(i) Details of the Statement

Jessie Gomez testified that on April 26, 1993, he was on duty as a police officer for the City of Redding. At 12:18 a.m., Officer Gomez responded to a report of an assault. At the apartment in question, he contacted a female named Heather Moore. No other adult was present at the apartment. Officer Gomez testified that Heather told him she got into a fight with her boyfriend, whom she identified as appellant. Heather said appellant left the apartment before Gomez arrived on the scene. Heather said she was arguing with appellant about his drinking. Appellant slapped her on the right side of her face. She scratched appellant on the arm, which made him angrier. Heather said appellant then grabbed her by the arms and dragged her off the bed and began assaulting

her. Heather told Gomez appellant hit her in the head with a closed fist and called her a bitch.

(ii) Analysis

Respondent contends that Heather's statements to Officer Gomez were not testimonial in nature because she was seeking aid, not telling a story about the past. We disagree.

When Officer Gomez arrived at Heather's apartment, appellant had already departed the scene. Heather was under no immediate threat. Officer Gomez was not confronted with an emergency in progress. This situation is analogous to the officer in the *Hammon* case, where there was no emergency in progress, no immediate threat to the victim's person, and the officer was simply seeking to determine " 'what happened' " rather than " 'what is happening.' " (*Davis, supra,* 547 U.S. at pp. 829-830; accord *Cage, supra,* 40 Cal.4th at p. 985 [testimonial nature of victim's statement to police officer reflected in the facts that "alleged assailant and the alleged victim were geographically separated" and the victim "was in no danger of further violence as to which contemporaneous police intervention might be required"].) Officer Gomez's primary purpose in taking Heather's statements was "to produce evidence about past events for possible use at a criminal trial." (*Cage, supra,* 40 Cal.4th at p. 984 [statement testimonial if primary purpose of giving and receiving statement is "to produce evidence about past events for possible use at a criminal trial"]; *Davis, supra,* 547 U.S. at p. 822 [statement is testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"].)[7] Officer Gomez's

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[7] The cases relied upon by respondent are clearly distinguishable from the non-emergency situation confronted by Officer Gomez. (See *People v. Osorio* (2008) 165 Cal.App.4th 603, 614 [burglary victim's statement to police officer not testimonial where the victim was identified as an "injured party" at the scene of the fire, the officer described "the whole scene as 'chaotic,' " and the victim "appeared to be in shock and had a cut or slashing injury to her neck," and the officer did not know an assault had occurred when he asked the victim what had happened]; *People v. Brenn* (2007) 152

interrogation also appears to satisfy the fifth characteristic of testimonial hearsay identified in *Cage, supra,* namely, "sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses." (*Cage, supra,* 40 Cal.4th at p. 984; see also *Davis, supra,* 547 U.S. at p. 827 [formal interview in calm surroundings, as opposed to "frantic" 911 call, indicates testimonial interrogation].)

(b) Statement to Sergeant Severson on April 29, 1993

(i) Details of the Statement

Sergeant John Severson of the Redding Police Department testified that on April 29, 1993, he went to Heather Moore's apartment to interview her about the assault on April 26 to which Officer Gomez responded. Severson testified that Heather told him appellant had been drinking heavily. During the course of an argument, appellant punched her in the head with a closed fist while she has holding the baby. The force of the blow caused her head to snap to the side and strike her baby's head. Heather also told Severson that after she scratched appellant on the arm he punched her another four or five times, and that when she ran next door to call the police, appellant followed and yanked the phone cord out of the wall.

Cal.App.4th 166, 178 [exchange between victim and officer was informal, brief and unstructured — officer had only a few moments with victim before the paramedics arrived, and asked victim a few general questions about what was going on — therefore victim's statement not testimonial]; *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1479 [responding officer "interrupted an ongoing emergency and obtained information from the victim in order to assess the situation" where he "heard the woman screaming as he stood at the door; the man who answered the door had blood on his hands; and the woman in the bathroom had a bloody, broken nose. That is the only information the officer had when he asked "what happened?" — victim's statement not testimonial].) Respondent also relies on *People v. Saracoglu* (2007) 152 Cal.App.4th 1584 (*Saracoglu*). In *Saracoglu,* the appellate court concluded there was an ongoing emergency where a domestic violence victim fled her home, went to the police station and reported that 30 minutes earlier her husband assaulted her and threatened to kill her if she went to the police. (*Id.* at p. 1587.) However, the circumstances confronted by Officer Gomez were patently not those of an ongoing emergency, therefore *People v. Saracoglu* does not control here.

(ii) Analysis

Patently, Severson's purpose in interviewing Heather on April 29, 1993, three days after the alleged assault on April 26, was not to deal with a present emergency but to obtain a statement about past events for possible use in a criminal prosecution. The Attorney General concedes that Heather's statements to Sergeant Severson are testimonial under the standards enunciated in *Davis, supra,* 547 U.S. 813 and *Cage, supra,* 40 Cal.4th 965. In any event, we have already ruled Heather's statements to Sergeant Severson inadmissible under state hearsay rules. (See *Younger II, supra,* at p. *10.)

(c) Verbal Statement to Officer Reinhardt on July 18, 1995

(i) Details of the Statement

Todd Reinhardt testified that on July 18, 1995, he was a police officer for the City of Oroville. At about 7:10 a.m. that day, Officer Reinhardt was dispatched to Heather's apartment after she called the police and "indicated that she had been involved in an ongoing disturbance throughout the night with [appellant] and that she wanted to report the incident." Heather reported she had not called earlier because appellant would not allow it. When Officer Reinhardt arrived, he found Heather at the apartment with her two children. Officer Reinhardt testified that Heather told him she had been physically and sexually assaulted by appellant. Heather told Officer Reinhardt appellant battered her about the entire body and kicked her in the hip. Heather told Reinhardt she wanted to leave the apartment before appellant returned. Officer Reinhardt then transported Heather and her children to the Oroville police station.

(ii) Analysis

Respondent contends Heather's statements to Officer Reinhardt were not testimonial because the circumstances indicate she "was not acting as a witness or testifying." Our evaluation of the record here leads us to a contrary conclusion.

Officer Reinhardt went to Heather's apartment to take her statement regarding a disturbance which occurred the night before. Heather's call to the police station did not

reflect an emergency situation such as the 911 call in *Davis, supra.* Rather, the purpose of Heather's call to the police station was not to seek aid or assistance, but to report an incident involving appellant which had already occurred. In fact, the circumstances attendant to Officer Reinhardt's interview of Heather are virtually indistinguishable from those described in the *Hammon* case. When Officer Reinhardt arrived at Heather's apartment, there was "no emergency in progress" (*Davis, supra*, 547 U.S. at p. 829) "no immediate threat to [the victim's] person" (*Id*. at p. 830), and the officer was simply seeking to determine " 'what happened' " rather than " 'what is happening.' " (*Ibid*.) Therefore, our review of the record leads to only one conclusion—that Heather's verbal statements to Officer Reinhardt constituted testimonial hearsay.

(d) Written Statement to Officer Reinhardt on July 18, 1995

(i) Details of the Statement

At the Oroville police station, Heather filled out a written statement about what happened the night before. Officer Reinhardt identified the statement at trial and it was placed on a projector so that the jury could read it. In his closing argument, the prosecutor read the statement again to the jury in its entirety, as follows:

"The argument started around 7:30 p.m. [Appellant] became mad after I told him he needed to move out to his mother's. I was washing dishes when he jerked my head around by my hair and then strangled me by my neck. I backed into a corner and told him to quit hitting me, and he grabbed me by the hair again jerked me around and told me to shut up. He then told me how he was going to kill me and called my [*sic*] a lot of names, bitch, whore, slut, and told me how I ruined his life.

"I kept trying to leave, but he would just push me down and probably three or four times [*sic*]. I then managed to get my car keys and get out of the door, but he let my babies follow me crying down a flight of stairs. When I went to retrieve my smallest child, he grabbed me again by the hair, threw me in the house and knocked me on the floor. He then kicked me as hard as he could in my right hip. This has caused me a lot of pain. All of this was done in front of my crying children. He then went . . . on with the name-calling and would reach out and hit me when he got extremely mad.

"His mood then changed and he wanted me to shoot him with his shotgun and said he would OD on his medicine. Then he went back to calling me names . . . and grabbing at me sticking his fist in my face and yelling.

"Around 9:30 he finally passed out and left me alone until around 11:00 when he came into my room and said he was going to have sex with me. I told him he wasn't going to touch me, and he ignored me. I begged him and yelled at him to leave me alone but he ripped my shorts off. He strangled me and held me down. . . . I fought him the whole time telling him he was going to jail for rape. I also begged him not to do it in front of the kids who were wide-awake watching.

"When he was done, he called me names for another hour or more so I went to the living room couch. Around 5:30 it started again with the name calling and threatening my life. He wanted my . . . keys to the car, and when I said no he started pulling at my clothes again and said he would have sex with me again if I didn't give him my keys. I begged him no and gave him the keys. He said that he would take what he wanted anyway. I begged and cried no.

"He told me if I called the cops or tried anything he would kill me and that I would pay for ruining his life. He then left. I went to the phone and called the police station. [¶] It was a night of physical and mental torture."

The Attorney General concedes that Heather's written statement prepared at Officer Reinhardt's request was testimonial in nature and admitted in violation of appellant's confrontation rights. We agree that Heather's written statement is testimonial under *Davis, supra,* 547 U.S. 813 and *Cage, supra,* 40 Cal.4th 965.

(e) Statement to Detective Hatley on July 18, 1995

(i) Details of the Statement

Oroville police detective Arthur Hatley testified that he met with Heather Moore at the Oroville Police Dept on July 18, 1995, at about 1:00 p.m. in connection with her report of an assault earlier that day. Detective Hatley testified that Heather told him that she and appellant argued because she wanted appellant to move out of the apartment. Heather said appellant grabbed her by the throat and hair, threw her to the ground, and

kicked her several times. Heather told Detective Hatley that she went to bed with the children around 11 p.m. Heather said appellant got into bed with her and the children and then forcibly raped her. Moore told Detective Hatley that appellant held her down, choked her, removed her underwear and had non-consensual intercourse with her. Heather told Detective Hatley that appellant had threatened on numerous occasions that he would kill her or take the children.

(ii) Analysis

The Attorney General concedes that Heather's statement to Detective Hatley at the police station was testimonial, and we agree. In any event, we have already ruled Heather's statement to Detective Hatley is inadmissible under state hearsay rules. (See *Younger II, supra*, at p. *10.)

(f) Statement to Dr. David Cohen on July 18, 1995

(i) Details of Statement

Dr. David Cohen testified that on July 18, 1995, he treated Heather Moore at Oroville Hospital while working as an emergency room physician. Cohen prepared a medical report based on his examination of Heather. Cohen testified his physical examination revealed bruising on Heather's neck, a bruise on the left hip; and bruises on her right buttock and lateral thigh.

Cohen testified that Heather told him she received the above injuries during non-consensual intercourse. Also, Cohen testified he conducted a sexual assault exam on Heather because she alleged she had been sexually assaulted. Heather told Cohen she was sexually assaulted by "penile penetration of the vaginal vault" and ejaculation on her pubic area. Cohen testified that as part of his sexual assault exam, he examined Heather's pubic area, found no visible evidence of semen in the vagina but observed dried semen on her pubic hairs.

Dr. Cohen testified his report indicated Heather registered at the hospital at 9:43 a.m. and was admitted at 11:00 a.m., that the alleged rape occurred the evening before, and that Heather appeared calm for the situation.

(ii) Analysis

At issue are Heather's statements to Dr. Cohen: (1) that she had been involved in nonconsensual intercourse; and, (2) that she had been sexually assaulted by "penile penetration of the vaginal vault" and ejaculation on her pubic area. Relying on *Cage, supra,* 40 Cal.4th 965, the Attorney General contends that Heather's statements to Dr. Cohen are not testimonial in nature, and are therefore admissible. We disagree.

Regarding Heather's statement to Dr. Cohen that "she was involved in nonconsensual intercourse," we ruled in *Younger II* that it was inadmissible as a matter of state law. (*Younger II*, *supra,* at p. *10 & fn. 19.)[8] Furthermore, Heather's other statement to Dr. Cohen that she had been sexually assaulted by penile penetration of the vaginal vault and ejaculation on her pubic area is not constitutionally admissible under *Cage.* In *Cage,* John's statement to Dr. Russell was gathered to help the doctor determine "the exact nature of the wound, and thus the correct mode of treatment." (*Cage, supra,* 40 Cal.4th at p. 986.) Moreover, there was "no evidence that Dr. Russell was acting in conjunction with law enforcement, or that his question about the cause of John's injury had any evidence-gathering aim." (*Id.* at p. 987.) Here, by contrast, Heather's statement to Dr. Cohen was made during a sexual assault examination, which Dr. Cohen conducted because Heather alleged she had been sexually assaulted. Unlike Dr. Russell in *Cage, supra,* Dr. Cohen did not question Heather to help him determine the correct mode of treatment for her: Indeed, Dr. Cohen neither administered or prescribed any medical treatment for Heather. Rather, the doctor's "evidence-gathering aim" in questioning Heather in the course of his sexual assault exam was to establish or prove Heather's allegation that she had been sexually assaulted. (*Cage, supra,* 40 Cal.4th at p. 987.) In sum, we conclude that objectively viewed "the primary purpose" of Dr. Cohen's question and Heather's answer was "to establish or prove past facts for

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[8] We note in *Cage, supra,* that the Court of Appeal affirmed the trial court's ruling that John's statement to Dr. Russell was "admissible as a matter of state law" and the only issue before the Supreme Court was whether the admission of John's statement to Dr. Russell violated the confrontation clause. (See *Cage, supra,* 40 Cal.4th at p. 974-975.)

possible criminal use," and not to help him "deal with the immediate medical situation he faced." (*Cage, supra,* 40 Cal.4th at p. 986.) Thus, Heather's statement to Dr. Cohen amounted to testimonial hearsay.

(g) Statement to Sergeant Jerry Roberson on July 20, 1995

(i) Details of Statement

Oroville Police Sergeant Jerry Roberson testified that on July 20, 1995, he was on patrol duty when he was dispatched "to a call of a woman reporting that her boyfriend was trying to break into her apartment." Roberson responded to 675 Mitchell Way, where he met with Heather Moore. Sergeant Roberson testified that when he arrived at the apartment, Heather was crying and appeared upset and scared. Roberson testified that the boyfriend was present at the apartment and that he spoke briefly with the boyfriend, who identified himself as Darrell Younger. Roberson further testified that when he arrived, Heather and appellant were inside the apartment together. Roberson did not recall "any indication that they were actively fighting at that point." Roberson "separated the two parties and [] had my conversation with Heather Moore inside the apartment while Mr. Younger sat on a curb outside the apartment down in the parking lot." Roberson testified that Heather told him she had been in her apartment with the door locked and her boyfriend kicked the door down. Roberson stated that "it was apparent the door had been forced open" because the door frame was shattered and the area where the hinges attached to the doorframe was broken and splintered. Roberson further testified that Detective Hatley arrived on the scene because he was the investigating officer on the assault Heather reported a few days before. Roberson stated that after Detective Hatley arrived, appellant was taken into custody for the assault.

(ii) Analysis

Respondent contends that Heather's statements to Sergeant Roberson were not testimonial because she made the statements just after appellant had kicked in the front door of her apartment and while she was crying and appeared upset and scared. We agree that Heather's statements to Sergeant Roberson were not testimonial.

In some respects, the circumstances of Sergeant Roberson's encounter with Heather are similar to those under which the high court in *Hammon* found that statements provided by the victim to law enforcement were testimonial. Specifically, upon his arrival Roberson saw no signs that the parties were "actively fighting" and he separated the parties before speaking with Heather. (Cf. *Davis, supra*, 547 U.S. pp. 829-830 [concluding that Amy Hammon's statement was testimonial because there was no emergency in progress and Amy was formally interrogated "in a separate room, away from her husband"].)

These similarities, however, do not mean Heather's statements to Sergeant Roberson must be deemed testimonial. Crucial to the high court's determination that there was no emergency in progress in the *Hammon* case were the facts that when the officers arrived at the Hammon household, Amy Hammon told that officers that "things were fine [citation] and there was no immediate threat to her person." (*Davis, supra,* 547 U.S. at p. 830.) One of the officers then questioned Amy "for the second time, and elicited the challenged statements." (*Ibid.*) At that point, the high court concluded, the officer "was not seeking to determine . . . 'what is happening,' but rather 'what happened.' " (*Ibid.*)

The situation confronted by Sergeant Roberson was very different. He was dispatched to Moore's apartment on the report that someone was trying to break the door down. He arrived to find the front door smashed from its hinges, two people inside the apartment, and Heather crying and visibly shaken. Roberson was the only officer on the scene at that point. He separated the parties and then spoke with Heather.

As the officer responding to a call of a possibly violent domestic dispute in progress, Sergeant Roberson " 'need[ed] to know whom [he was] dealing with in order to assess the situation, the threat to [his] own safety, and possible danger to the potential victim.' " (*Davis, supra*, 547 U.S. at p. 832.) Statements taken in initial police inquiries under such exigent circumstances are not testimonial if they are a "cry for help" or "the provision of information enabling officers immediately to end a threatening situation" (*ibid*), in other words to determine "what is happening" rather than "what happened," (*id.*

at p. 830). Where Sergeant Roberson arrived to find the entrance door smashed from its hinges and Heather crying and visibly shaken, we conclude that, objectively viewed, Roberson's primary purpose in his initial encounter with Heather was to render assistance and determine just what was going on at the apartment. Accordingly, Heather's statements to Officer Roberson were not testimonial. (*Davis, supra,* 547 U.S. at p. 830.)

(h) Statement to Detective Hatley on July 20, 1995

(i) Details of Statement

Detective Hatley testified that while on duty July 20, 1995, he was advised that a 911 call of domestic violence had been received from 675 Mitchell Way. He was familiar with that address because he spoke with Heather two days before and "knew what her address was." Detective Hatley testified that when he arrived at Heather's apartment, he saw Officer Jerry Roberson talking to appellant outside the apartment and noticed other Oroville police officers present. Hatley went inside the apartment and spoke with Heather. Detective Hatley testified that Heather told him appellant arrived at the apartment, demanded entry and then broke the door down. Hatley saw that the door had been kicked from the hinges.

(ii) Analysis

The Attorney General contends that Heather's statements to Detective Hatley are not testimonial because they are "based on the same circumstances" as the statements she made to Officer Roberson and she "was not acting as a witness or testifying." We disagree.

Detective Hatley did not confront the same situation as Officer Roberson. Detective Hatley arrived on the scene after Officer Roberson, and by the time he arrived there was no emergency in progress.[9] Heather and appellant were in separate locations.

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[9] The high court recognized the dynamics present in any investigative situation and cautioned that "a conversation which begins as an interrogation to determine the need for emergency assistance . . . [may] evolve into testimonial statements once that purpose has been achieved." (*Davis, supra,* 547 U.S. at p. 828.) Thus, the high court acknowledged that " '[o]fficers called to investigate [a domestic violence dispute] . . . need to know

Officer Roberson was questioning appellant outside the apartment, and other Oroville police officers were present at the scene. Thus, when Detective Hatley went inside the apartment and spoke with Heather, she was under no immediate threat or harm. These circumstances are indistinguishable from those of the *Hammon* case as described and discussed in *Davis, supra.* (Cf. *Davis, supra,* 547 U.S. at pp. 829-830.) Thus, as the high court concluded with respect to the statements at issue in the *Hammon* case, we conclude that "[o]bjectively viewed, the primary, if not indeed the sole, purpose of [Hatley's] interrogation was to investigate a possible crime." (*Davis, supra,* 547 U.S. at pp. 829-830.) Therefore, Heather's statements to Detective Hatley were testimonial.

C. Error Not Harmless Beyond A Reasonable Doubt

1. Legal Standards

We have concluded that all but one of Heather's statements identified by appellant constituted testimonial hearsay admitted in violation of appellant's federal constitutional right to confrontation under the Sixth Amendment. Before we can declare this federal constitutional error harmless, we must "be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra,* 386 U.S. at p. 24.) " 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " (*Id.* at p. 23, citing *Fahy v. Connecticut* (1963) 375 U.S. 85, 86-87.) Otherwise stated, *Chapman* stands for the principle that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.)

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whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim . . . [and that] [s]uch exigencies may *often* mean that 'initial inquiries' produce nontestimonial statements." (*Davis, supra,* 547 U.S. at p. 832.) However, the high court observed that in *Hammon* "[the victim's] statements were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation, [therefore] the fact that they were given at an alleged crime scene and were 'initial inquiries' " did not render them nontestimonial. (*Ibid.*)

Whether a confrontation clause error was harmless under *Chapman* depends on a number of factors, including (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. (*Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684)

2. Analysis

After reviewing the entire record, we conclude that there is a " 'reasonable possibility that the evidence complained of might have contributed to the conviction' " (*Chapman, supra,* 386 U.S. at p. 23), and therefore we must reverse appellant's conviction. In this case, the key question for the jury was whether Heather's death was a murder or a suicide by hanging. The parties presented conflicting evidence by experienced forensic pathologists on this issue. Inconclusive forensic evidence meant that evidence of domestic discord offered by the prosecution assumed center stage and furnished both the motive and intent to establish appellant killed Heather with malice.

The prosecution's forensic pathologist, Dr. Jay Chapman, conducted the autopsy on Heather. Dr. Chapman opined there were various circumstances inconsistent with a suicidal hanging, such as the fact that Heather's hair was entangled in the knot forming the noose. Also, Chapman testified that the length of the rope was inconsistent with suicide because the body was in a sitting position and the rope stretched all the way to the showerhead, whereas he would have expected the rope to be shorter in order to put pressure on the neck without sitting all way down in the tub. Chapman also thought it significant that the body faced away from the showerhead. Chapman stated that he would have expected a suicide to face the showerhead after tying a rope to it. Finally, Chapman opined women usually commit suicide fully clothed, not clothed only in underwear, as in Heather's case. Chapman acknowledged, however, that he found no discernible external injuries apart from the abrasion furrow on the neck from the rope, and that scrapes or cuts "of any significance" would still have been visible despite the

decomposition in the body. He also acknowledged that if Heather had been smothered, there would have been injury to her lips, but no such injury was found.

The defense expert pathologist, Dr. Robert Lawrence, testified he had conducted thousands of autopsies, including investigative autopsies on at least 500 cases of suicide. Dr. Lawrence formed the opinion that Heather Moore died by suicide. He testified that he ruled out homicide as a cause of death because the autopsy revealed no hemorrhages inside the neck organs, no fingertip bruises, i.e., none of the signs of manual strangulation; nor was there any sign of ligature strangulation. Dr. Lawrence testified that in his opinion the lack of such injuries is consistent with suicidal hanging, where the pressure is exerted gradually, causing little or no internal neck trauma. Dr. Lawrence opined that if Heather died by homicide without leaving any marks it would have to have been by drowning, suffocation (asphyxia) or drugs. However, no drugs were found in Heather's system. As to drowning, Lawrence stated in his experience it is not possible to drown a healthy person against her will without evidence of a struggle, and there were no signs of a struggle here.

Furthermore, Dr. Lawrence testified he found nothing about the circumstances that was inconsistent with suicide. For example, the fact that Heather's body was in contact with the tub when she was found was not inconsistent with suicide. Dr. Lawrence explained Heather's body may have been suspended initially and then came into contact with the tub after death as the rope grew more taut and her neck stretched. In his capacity as pathologist, Dr. Lawrence would have stated the cause of death as "asphyxia due to hanging, and the manner of death would be suicide." In sum, the evidence presented by the parties on the cause of death is in virtual equipoise.

Furthermore, none of the forensic evidence established appellant's guilt. Head hair and pubic hair samples for Heather and appellant, as well as head hair samples of Heather's and appellant's two children, were compared with those found (1) on the rope, (2) on Heather's hands, fingernails and body, and (3) in the body bag where she was placed when removed from the bathtub. None of the hairs found on the rope or found on or adjacent to Heather matched those of appellant. No fingerprints were found on the

showerhead or on the shower curtain. There was no evidence Heather's underpants or bra had been torn or damaged and there were no traces of urine or feces in her underpants. No material such as blood or flesh was found under Heather's fingernails to indicate some kind of violent struggle. No blood or urine was found anywhere else on the floors of the apartment or on the bedding. Moreover, when the bathroom was dusted for prints prior to the removal of the body, no footmarks of any kind, either bare or shoed, were found on the linoleum.

The lack of any inculpating forensic evidence meant that the prosecution case against appellant was largely circumstantial. Within the context of this circumstantial evidence case, the prosecution's introduction of evidence of appellant's prior instances of domestic violence assumed great importance. In his closing argument, the prosecutor reviewed each instance of domestic violence by appellant reported by Heather and others. Summing up this evidence of domestic violence, the prosecutor told the jury that "if you find he committed all of these domestic violence incidents against all these different people, you can infer, you're not required to, but you can infer that in fact he committed this particular crime, and this particular crime is the murder of Heather Moore." Pressing his point, the prosecutor added that: "When . . . you look at the domestic violence in Redding, in Oroville with the other individuals, you look at the domestic violence here in Santa Rosa, there is only one conclusion, and that is that *this is a domestic violence homicide*." (Italics added.)

To be sure, there were witnesses other than Heather who testified to appellant's acts of domestic violence. Amy Donnelly, who worked with Heather at Lyon's Restaurant in Santa Rosa in the months before her death, testified how Heather confided in her about problems she was having with appellant. According to Donnelly, Heather often talked about leaving appellant because of domestic abuse and his drinking problem and on three occasions showed Donnelly bruises from blows inflicted by appellant. Karen Moore, Heather's aunt by marriage, testified that one time Heather called from Redding, California, and asked to come and stay with her because she had been assaulted

by appellant.[10] According to Karen Moore, when Heather arrived she had a bruise on her upper right arm and another on the right side of her face. Cara Sutton, appellant's former spouse, testified appellant assaulted her once towards the end of their marriage following an argument about the fact that Sutton was making the payments on appellant's motorcycle and refused to continue doing so. After a verbal altercation, Sutton walked out of the living room and went to lie down in the bedroom. Appellant came into the bedroom and jumped on top of Sutton, who then turned face down on the mattress. Appellant sat on her lower back, and, as she wriggled and squirmed, took a pillow and put it over her head and held it down on each side. Sutton further testified that after she got out from underneath the pillow appellant then put his hands around her neck and pressed hard, leaving red marks on her neck. Sutton said she was scared. Appellant's sister Antoinette came down the hallway yelling at appellant to leave Sutton alone, at which point appellant got up and walked away. Additionally, Ramona Eller (formerly Taylor), appellant's girlfriend, testified she and appellant argued one time at Antoinette's apartment. Eller stated appellant hit her about the legs and then knocked her unconscious with a punch to the right side of her head. When she came to, they argued again in the kitchen and when Eller turned to leave appellant grabbed her from behind by putting his hands around her throat and pressing hard into her windpipe. The next day she had bruises on the side of her neck. Eller stated that as he was choking her appellant said he was going to kill her and throw her body in the river so no one would ever find her. Then he stopped and became very apologetic. Eller also described another incident at Antoinette's apartment. Heather gave Eller a rude look so Eller called Heather a bitch. Eller stated the next thing she knew appellant had his hands around her throat and pinned against the wall.

Nevertheless, we cannot say that the other domestic violence evidence by these witnesses carries the same weight as the testimonial statements by Heather about appellant's acts of domestic violence against her. In fact, we find it significant that

[10] Appellant has raised no objection to the admission of Heather's statements to Amy Donnelly or Karen Moore on confrontation grounds.

Heather's statements provided the only evidence that appellant actually threatened her life before he was accused of killing her. In this regard, we note that Heather's written statement, given just six months before her death, provides direct evidence of appellant's intent to kill and appellant's violent propensity towards Heather. In her statement, Heather describes how appellant, over the course of several hours, repeatedly hit her, kicked her, threw her around by the hair, called her by a string of abominable names, and threatened to kill her. Further, she describes how he forcibly raped her in front of the crying children as she begged him to stop during "a night of physical and mental torture." The prosecutor was fully aware of the powerful evidentiary value of this statement. He published it to the jury on an overhead projector so that the jurors could read it. And at closing argument, he told the jury the statement "was important when I introduced it, . . . and I still think it's important today . . . [¶] And I think it's so important that you're going to have to bear with me and I'm going to read it to you." After reading Heather's statement in its entirety, the prosecutor then tied it in with other testimonial evidence provided by Dr. Cohen and Detective Hatley which corroborated Heather's written statement. It goes without saying, we think, that such graphic testimony from the mouth of the victim would weigh heavier with the jury than evidence of appellant's older prior acts of domestic violence against other women.

In sum, our review of the record reflects a paucity of evidence at the scene that appellant murdered Heather. As we have already indicated, the case against appellant was highly circumstantial. Thus, the prosecution presentation of appellant's prior acts of domestic violence took on added significance in the jury's attempt to determine whether Heather was murdered, and if so, by whom. Although there was evidence of prior acts of domestic violence by appellant from sources other than Heather, none of that evidence had the impact of that provided by Heather herself, especially in her written statement rendered less than six months before her death. Therefore, we cannot say with confidence the constitutional error was "harmless beyond a reasonable doubt" (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 681) because we think " 'there is a reasonable

possibility' " that Heather's testimonial statements might have contributed to the conviction, (*Chapman, supra*, 386 U.S. at p. 23).

DISPOSITION

As noted previously, this is the third opinion we have issued in this case. During the pendency of this matter, the United States Supreme Court has issued three decisions, *Crawford v. Washington*, *Davis v. Washington* and *Giles v. California*, that provide the framework for our analysis of the evidence admitted to secure Younger's conviction. The decision we reach today reflects our careful application of these decisions to the record before us. Accordingly, and for the reasons stated above, we reverse appellant's conviction and, we remand this matter for further proceedings consistent with this opinion.[11]

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Pollak, J.

[11] We express no opinion regarding the merits of the evidence before us in this appeal in the event of a re-trial in this matter.